MAR 12 2001
(12)

Supreme Court, U.S.
FILED
MAR 12 2001
CLERK

No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONER

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court held that the defense of qualified immunity is available where an officer is alleged to have conducted an unreasonable search or seizure, even where the *general* legal standard governing his conduct is well-established. Immunity, the Court held, may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a high level of generality. *Id.* at 639. Instead, immunity must be granted unless "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right," *i.e.*, "the unlawfulness must be apparent" in "light of pre-existing law." *Id.* at 640 (emphasis added). See also *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity proper unless it was sufficiently "obvious" in advance "that no reasonably competent officer would have concluded" that the actions were constitutional). Qualified immunity thus protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 341).

Anderson specifically rejected the claim that, because the substantive guarantee of the Fourth Amendment and the test for qualified immunity are both framed in terms of reasonableness, qualified immunity is superfluous in Fourth Amendment cases. The Court rejected that argument as logically flawed because it relies on the coincidence of the word "reasonable" in both the qualified immunity test of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and the substantive command of the Fourth Amendment. *Anderson*, 483 U.S. at 643-644. The Court refused to carve out a Fourth Amendment exception to *Harlow*'s "across the board" application based on that coincidence of language. Although the word "reasonable" appears in both contexts, it serves differ-

ent purposes and has different meanings in each. In the Fourth Amendment, it defines the boundary of lawful conduct; in qualified immunity, it defines the somewhat broader zone of conduct an officer might reasonably have believed to have been lawful in light of pre-existing law. Where a law enforcement officer makes a reasonable although mistaken judgment regarding the lawfulness of a search under the Fourth Amendment, the Court held, he should "no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 643-644. See also 1 Wayne R. LaFave, *Search and Seizure* § 1.10(b) at 328 (3d ed. 1996) ("[T]he *Anderson* majority rejected" the contention "that a violation of the Fourth Amendment, being an 'unreasonable' search or seizure, could never be reasonable under *Harlow*.").

Respondent and his amici do not seriously dispute that understanding of *Anderson*. Nor do they deny that *Anderson*, like *Harlow* before it, "clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Anderson*, 483 U.S. at 645. Nonetheless, they contend that this Court should announce an exception for seizures effectuated through allegedly unreasonable force. Their arguments in support of that exception, however, are unpersuasive; were rejected by this Court in *Anderson*; and not only undermine the purposes of qualified immunity, but also dilute the substantive guarantee of the Fourth Amendment itself.

A. The Qualified Immunity Inquiry Is Distinct From Fourth Amendment Reasonableness

Although the decision below attempted to distinguish *Anderson* as a case involving an unclear legal standard, Pet. App. 14a n.4; Gov't Br. 32-38, respondent and his amici abandon that effort. Instead, respondent and his amici suggest that *Graham* v. *Connor*, 490 U.S. 386 (1989), decided a few years after *Anderson*, somehow obviates the need for

qualified immunity in excessive force cases. In *Graham*, this Court clarified that courts should evaluate an officer's use of force to effectuate an arrest under the Fourth Amendment standard of "objective reasonableness" rather than a test derived from the "shocks-the-conscience" due-process standard of *Rochin* v. *California*, 342 U.S. 165 (1952). See *Graham*, 490 U.S. at 393. *Graham* also identified several factors relevant to that reasonableness determination, such as the severity of the crime, potential threats to officer safety, and whether the suspect resists arrest or flees. *Id.* at 396. The Court also emphasized that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* The reasonableness inquiry in the excessive force context, as in other Fourth Amendment contexts, thus allows room for reasonable factual errors. The test is applied in light of the circumstances as a reasonable officer could have perceived them, even if that perception turns out to have been mistaken. See *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987) (Fourth Amendment allows "for honest mistakes"); *Illinois* v. *Rodriguez*, 497 U.S. 177, 185-186 (1990) (similar); 2 LaFave, *supra*, § 3.2(b) at 37.

1. Characterizing the "objective reasonableness" standard of *Graham* as deferential to officer judgments, respondent and his amici argue that the *Graham* standard is indistinguishable from—or functions similarly to—the qualified immunity standard. See, *e.g.*, ACLU Br. 15 ("the standard for determining qualified immunity is the *same* as that for deciding the constitutional question itself"); Resp. Br. 22 ("the standards, if not precisely the same in theory, are the same in application"); *id.* at 25-26 ("minuscule difference" of "semantics"). As an initial matter, it is difficult to view *Graham* as imposing a constitutional standard that is so deferential to officer judgment that it created a sub-silentio exception to *Anderson* and *Harlow*'s mandate for across-the-board application of qualified immunity principles. Far from

expanding deference to officer judgments (which, in respondent's view, would minimize the need for qualified immunity), *Graham reduced* deference by selecting the more exacting "objective reasonableness" standard over the more permissive shocks-the-conscience approach. 490 U.S. at 393.

More fundamentally, respondent and his amici overlook critical differences between the Fourth Amendment and qualified immunity inquiries. Both take the perspective of a reasonable officer on the scene, account for the split-second nature of officer decisions, and provide room for reasonable mistakes of *fact*. But the qualified immunity inquiry incorporates an additional consideration that the Fourth Amendment does not—what a reasonable officer could have understood *the requirements of law* to have been at the time he acted. The Fourth Amendment inquiry focuses on the officer's use of force and asks whether it was objectively reasonable. The qualified immunity inquiry focuses on established law and asks whether it gave the officer sufficiently clear notice that his conduct was unlawful. Thus, the qualified immunity standard, unlike the Fourth Amendment itself, allows for reasonable mistakes of law.

The lesson of *Anderson* is that qualified immunity is appropriate notwithstanding settled general legal standards if those standards and pre-existing law would not necessarily put a competent officer on notice that "what he is doing," under the specific circumstances he confronted, violates the law. 483 U.S. at 640. Where reasonable officers could differ as to the lawfulness of the conduct, immunity is appropriate; immunity may be denied only if the conduct's illegality was sufficiently "obvious" that "no reasonably competent officer would have" thought it lawful. *Malley*, 475 U.S. at 341.[1]

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[1] Although the ACLU objects (Br. 16-17) to *Malley*'s use of the term "obvious," there is little difference between *Malley*'s standard of obviousness, *Anderson*'s insistence that the illegality be "apparent," or the requirement that the mistake of law be one that "no reasonable officer"

Although *Graham* establishes the general framework for assessing reasonableness, it does not establish with clarity whether particular uses of force, under specific circumstances, are constitutionally reasonable; nor does it preclude courts from altering or refining, over time, their view of the legality of particular conduct. As the Second Circuit has explained, "to say that the use of constitutionally excessive force violates a clearly established right * * * begs the open question whether the particular degree of force under the particular circumstances was" so clearly "excessive" that no reasonably competent officer could have thought it lawful. *Finnegan* v. *Fountain*, 915 F.2d 817, 823 (1990). Consequently, a Fourth Amendment violation occurs when, even taking due account of the officer's factual perspective, the conduct transgresses the bounds society is prepared to accept as reasonable. But immunity remains appropriate unless that conduct went sufficiently "beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless existing case law or the "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000); *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1559 (1993), amended, 14 F.3d 583 (11th Cir. 1994).

2. Respondent's and his amici's reliance on the deference owed to the officer's perspective under *Graham*, moreover, fails to distinguish this case from *Anderson*. Both the probable cause standard at issue in *Anderson* and the excessive force standard at issue here provide a sensible measure of deference to officer judgments. In both contexts, qualified immunity provides a useful additional margin for reasonable

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would have made. In the end, qualified immunity must protect "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229 (internal quotation marks omitted).

error to protect competent officers from the burden of litigation and potential liability for reasonable legal mistakes.

Like the reasonable force inquiry, the probable cause inquiry at issue in *Anderson* proceeds from the perspective of a reasonable officer on the scene, allows room for reasonable factual errors, and accords a certain amount of deference to officer judgments. The standard of probable cause, no less than the standard for reasonable force, accords officers "fair leeway for enforcing the law in the community's protection," and "allow[s] for some mistakes" in light of the fact that "many situations which confront officers * * * are more or less ambiguous." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949); 2 LaFave, *supra*, § 3.2(b) at 37. Indeed, it was precisely for those reasons that the *dissenting* opinion in *Anderson* urged the Court to create an exception to qualified immunity for mistaken probable cause determinations. See *Anderson*, 483 U.S. at 661 (Stevens, J.) ("emphasizing that the probable-cause standard itself recognizes the fair leeway that law enforcement officers must have in carrying out their dangerous work" and "leaves room for mistakes"). Rejecting that argument—as well as the contention that the probable-cause standard itself provides sufficient protection from lawsuits and liability—this Court instead required an additional measure of protection through qualified immunity. The probable-cause standard, although well established and deferential, sometimes fails to put officers on notice that their conduct, under the circumstances before them, is unlawful. *Id.* at 640, 644. When that occurs, "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable," even though ultimately mistaken, "should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." *Id.* at 644. The same is true here.

3. In an attempt to escape *Anderson*'s precedential force, respondent offers a series of purported distinctions between

the probable-cause standard at issue in *Anderson* and the standard of "objective reasonableness" at issue here. Probable cause, respondent and his amici assert, is an *ex post* inquiry (conducted from an objective perspective, after the fact), while reasonable force is examined *ex ante* (from the perspective of the officer on the scene). Resp. Br. 28; ACLU Br. 19-20. Probable cause, respondent and his amici further claim, is a complex, technical doctrine that is "often in a state of flux," "developing and uncertain," Resp. Br. 27, or "evolving," ACLU Br. 12-13; N.Y. Bar Br. 11.

The short answer is that, under *Anderson*, those purported distinctions make no difference. *Anderson* is not premised on the notion that probable cause is determined after the fact, or on the theory that the doctrine is peculiarly "technical" or "evolving." In *Anderson* itself, no such concerns were present; the sole question was whether, applying settled standards to the particular circumstances before the officers, probable cause and exigent circumstances were present. Gov't Br. 34-36; 483 U.S. at 640-641; *id.* at 657-658 (Stevens, J., dissenting) ("Anderson has not argued that any relevant rule * * * was not 'clearly established'" but contends that "his own reasonable belief that the conduct engaged in was within the law suffices to establish immunity."). Instead, *Anderson* rests on the observation that, in some cases, neither the probable-cause standard itself nor pre-existing case law will establish the "contours of the right" with such clarity that a reasonable officer must necessarily "understand that *what he is doing*" is unlawful. *Id.* at 640 (emphasis added). Where that occurs, the Court held, an officer is entitled to qualified immunity, whether or not there are any "evolving" abstract legal issues in the background.[2]

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[2] Following *Anderson*, the courts of appeals regularly address qualified immunity in cases where the only question is whether officers reasonably erred in believing that the facts before them were sufficient to

More fundamentally, the purported distinctions are no answer to the command of *Anderson* and *Harlow* that qualified immunity standards apply "across the board." Whatever minor differences may exist between the probable cause and excessive force standards, they pale in comparison to the vast differences among the standards established by other constitutional provisions. Yet *Anderson* and *Harlow* require that immunity be available with respect to purported violations of each. Respondent's emphasis on supposed differences between the two Fourth Amendment standards also ignores the fact that the proposed exception to qualified immunity that *Anderson* rejected was not limited to issues of probable cause. See 483 U.S. at 643. The Fourth Amendment's text requires reasonableness to play a role in every Fourth Amendment case, and *Anderson* rejected the view that the coincidence of the term "reasonable" in the qualified immunity test and in the Fourth Amendment's text provides a basis for declaring qualified immunity unavailable in Fourth Amendment cases. *Ibid.*

In any event, the purported distinctions relied on by respondent and his amici are without basis. With respect to the *ex ante* versus *ex post* distinction, Resp. Br. 28; ACLU Br. 19-20, both probable cause and reasonable force are determined from the *ex ante* perspective, *i.e.*, in light of the facts available to the police at the time the action was taken, as this Court's cases make clear. Compare *Graham*, 490 U.S. at 396 ("perspective of reasonable officer on the scene"), with *Hunter*, 502 U.S. at 228 ("Probable cause existed if '*at the moment the arrest was made* . . . the facts and circumstances * * * of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' that" a crime had been committed) (emphasis

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establish probable cause. *Lombardi* v. *City of El Cajon*, 117 F.3d 1117 (9th Cir. 1997); *Bagby* v. *Brondhaver*, 98 F.3d 1096 (8th Cir. 1996). Indeed, *Malley* v. *Briggs*, *supra*, was precisely such a case.

added).[3] Nor can one distinguish probable cause on the theory that *Graham* establishes a "nontechnical" doctrine. ACLU Br. 13. Probable cause is likewise "a practical, nontechnical conception." *Brinegar*, 338 U.S. at 176.

Finally, the probable-cause standard cannot be distinguished on the theory that it is in "flux" or "evolving," while reasonable force under *Graham* is not. It strains credulity to assert that the centuries-old probable cause standard is evolving and uncertain while the 12-year-old *Graham* standard has ossified. The cases amici cite for the uncertainty of the probable-cause standard (ACLU Br. 12) concern application of that standard to information from anonymous informants. Far from establishing widespread legal confusion about the probable-cause standard, those cases underscore the point this Court made in *Anderson*—that legitimate uncertainties exist in the application of most well-established legal norms, and police officers should not be held liable if they make reasonable, but ultimately erroneous, determinations about the application of the general standard to specific facts.

Graham, moreover, hardly eliminates all "legal uncertainty," Resp. Br. 27-28; ACLU Br. 21, regarding reasonable force. The reasonable force standard under *Graham* is by necessity highly general. As this Court has emphasized, "the test of reasonableness under the Fourth Amendment is not capable of precise definition," and depends on "a careful bal-

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[3] *Finnegan* v. *Fountain*, 915 F.2d at 824 n.11, upon which respondent and its amici rely for the *ex post/ex ante* distinction, *refused* to equate qualified immunity and substantive Fourth Amendment reasonableness. See *id.* at 823 ("We read Finnegan's argument to state that any use of constitutionally excessive force violates 'clearly established' rights, so that qualified immunity may not shield one who had used excessive force. We do not agree."). Similarly, respondent's claim that the Second and Fourth Circuits equate the two inquiries (Br. 22 & 23 n.12), is incorrect. The case law is to the contrary, Gov't Br. 29 n.12, as even respondent's amicus concedes, ACLU Br. 11 n.4.

ancing of the nature and quality of the intrusion * * * against the countervailing governmental interests." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). To be sure, *Graham* identifies three factors that should be considered in evaluating the use of force. But that list is non-exclusive, and *Graham* offers no indication of the relative weight assigned to each. Courts and juries applying *Graham* thus are left to balance all relevant considerations and decide "whether the totality of the circumstances justified a particular sort of * * * seizure." *Tennessee* v. *Garner*, 471 U.S. 1, 8-9 (1985). That open-ended balancing standard can no more unfailingly put reasonable officers on notice of the legality or illegality of their conduct in every possible circumstance than can the similarly open-ended totality-of-the-circumstances test used for probable cause (let alone the more definitive tests applied outside the Fourth Amendment context, each of which is backstopped by "across the board" application of qualified immunity). Indeed, judges applying *Graham* often can and do disagree on whether particular uses of force are reasonable, Gov't Br. 24-25 & n.8, and so too can reasonable officers.

Even at the abstract level, questions of reasonable force are no less plagued by uncertainty than are questions of probable cause. Courts and judges, for example, disagree over the seriousness of and weight accorded to certain crimes in the *Graham* balance,[4] whether certain types of force qualify as "deadly force,"[5] and on the extent to which

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[4] Contrast *Hammer* v. *Gross*, 932 F.2d 842, 846 (9th Cir.) (drunk driving not serious for purposes of *Graham* because it was a misdemeanor) (en banc plurality), cert. denied, 502 U.S. 980 (1991), with *id.* at 852-853 & n.3 (Kozinski, J., concurring) (drunk driving extremely serious, fatality-producing offense).

[5] Contrast *McQurter* v. *City of Atlanta*, 572 F. Supp. 1401, 1416 (N.D. Ga. 1983) (choke-hold "a technique classified as 'deadly force,' in the same category as 'use of a firearm.'"), with *Gassner* v. *City of Garland*, 864 F.2d

an officer may use force to obtain evidence from a suspect's body.[6] Other open and novel legal issues abound.[7] *Graham* is helpful in addressing those issues. But it does not resolve them with such clarity that only "the plainly incompetent or those who knowingly violate the law," *Hunter*, 502 U.S. at 229, can cross the constitutional boundary separating lawful from unlawful force.[8]

394, 396, 400 (5th Cir. 1989) (use of choke-hold on unarmed suspect reasonable).

[6] Contrast *United States* v. *Holloway*, 906 F. Supp. 1437, 1443 (D. Kan. 1995) (use of pepper spray to obtain contents of defendant's mouth not excessive, as "[o]fficers were not required to simply wait to let nature take its course"), with *State* v. *Hodson*, 907 P.2d 1155, 1158 (Utah 1995) (applying pressure to throat to obtain contents of mouth excessive, as "[n]o emergency or exigency justifies the use of force at this level to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means").

[7] Courts have addressed the propriety of specific types of seizures and restraints, *e.g.*, *Cruz* v. *City of Laramie*, No. 99-8045, 2001 WL 127789, at *3-*4 (10th Cir. Feb. 15, 2001) (holding that officers may not use hog-tie restraint on suspect with diminished capacity, but that the "rule prohibiting such a restraint in this situation was" not "'clearly established' at the time" the officers acted); *Russo* v. *Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992) (no clearly established law regarding use of stun guns and tasers); and mechanisms for obtaining compliance, *Forrester* v. *City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994) (use of pain-compliance through nonchakus), cert. denied, 513 U.S. 1152 (1995).

[8] The ACLU also argues (Br. 15-16) that the probable-cause and exigent-circumstances inquiries at issue in *Anderson* are distinct from the reasonable-force inquiry because, when it comes to reasonable force, an officer has a "range of reasonable options" available to him. The fact that an officer may choose from a range of reasonable alternatives, however, does not mean that the boundary between "reasonable" and "unreasonable" force, and between reasonable and unreasonable options, is necessarily clear. Indeed, each available option may also cross the boundary of reasonableness if taken too far. The argument also does not distinguish searches from uses of force, or this case from *Anderson*. In both contexts, the ultimate and only question that must be decided is whether the action the officer actually undertook was sufficiently justified as to be rea-

Respondent's and his amici's reliance on *McNair* v. *Coffey*, 234 F.3d 352 (7th Cir. 2000), is mistaken for the same reason. In that case, the court declared that "[u]ncertainty about the legal standard" applicable to excessive force cases "ended" with *Graham*; although "[t]here may still be uncertainty in the application of that standard to particular situations," the court continued, "this is not the kind of legal uncertainty that *Anderson* and *Wilson* discuss." *Id.* at 354. That misreads *Anderson*: Uncertainty about the result of applying a settled standard "to particular situations" is precisely "the kind of legal uncertainty" that *Anderson* discusses. Gov't Br. 16-21, 34-35 & n.16. Moreover (as we pointed out, *id.* at 37 n.17, and respondent does not deny), demanding that officers identify legal uncertainty at some higher level of generality, as *McNair* does, would "transform[]" the *Harlow* standard "from a guarantee of immunity into a rule of pleading," a result that *Anderson* was designed to avoid. 483 U.S. at 639.

Indeed, notwithstanding respondent's and his amici's extesive reliance on *McNair*, they make no effort to reconcile *McNair*'s analysis with *Anderson*. (Nor does *McNair* itself. *McNair* cites *Anderson*, but does not discuss *Anderson*'s holding or analysis. See Gov't Br. 38 n.18.) For example, respondent (Br. 28-30) and his amici (*e.g.*, ACLU Br. 20-22) cite *McNair* for the proposition that officers should be "strictly liable" for unreasonable searches and seizures because they were strictly liable at common law. But *Anderson* rejected that precise argument. "[W]e have never suggested," the Court declared, "that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is

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sonable; that decision is essentially a binary one. Finally, like officers effecting an arrest, officers conducting a search have a range of reasonable options regarding *how* to conduct that search, and may violate the Fourth Amendment if they choose unreasonable means.

plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law." The Court continued: "*Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" 483 U.S. at 645. Respondent and his amici nowhere explain why that understanding is incorrect, or why strict liability should be substituted for the qualified immunity that *Harlow* and *Anderson* instruct should be applied across the board.[9]

4. Respondent's attempt to equate the qualified immunity inquiry with the test of reasonableness under the Fourth Amendment also suffers from a final defect—it misstates and dilutes the substance of the Fourth Amendment's guarantees. This Court's cases establish that an officer is entitled to qualified immunity for his unconstitutional con-

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[9] *McNair*'s attempt to dismiss qualified immunity in Fourth Amendment cases as a "judicial invention" is not only inconsistent with *Anderson*, but incorrect. This Court long has recognized qualified immunity in excessive force cases. See, *e.g.*, *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89, 123, 130-132 (1849) (naval officer protected from "mere errors of judgment" and not liable unless force was animated by "ill-will, a depraved disposition," or "malicious and wilful"). Moreover, as we explained (Gov't Br. 38 n.17), concerns about "judicial invention" are doubly misplaced in this context. Respondent and his amici similarly contradict rather than distinguish *Anderson* when (again following *McNair*) they argue (ACLU Br. 18) that applying qualified immunity—asking "whether a reasonable person would have *realized* that his conduct violates established legal standards—[would] reintroduce[] the element of subjectivity that *Graham* deliberately removed." *McNair*, 234 F.3d at 355-356. This Court rejected that precise argument in *Anderson*. The no-reasonable-officer test of *Harlow* and *Malley*, the Court held, "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent * * *. [T]he relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant." 483 U.S. at 641.

duct if an appropriately competent officer, based on established law, reasonably could have believed the conduct to be lawful at the time he acted. Attempting to equate the Fourth Amendment standard with qualified immunity, respondent and his amici state that the *Fourth Amendment* deems an officer's conduct to be "reasonable" within the meaning of constitutional text whenever a reasonable officer could have believed the conduct to be lawful. See, *e.g.*, ACLU Br. 15 (Fourth Amendment determination "necessarily" answers "whether a reasonable officer 'could have believed' his use of force 'to be lawful.'").

That formulation misstates the relevant Fourth Amendment standard. See Gov't Br. 30-31 n.13. It finds no support in *Graham*; that decision specifies that the Fourth Amendment standard is "objective reasonableness," not *arguable* reasonableness in light of pre-existing law. Nor can that formulation be reconciled with constitutional text. The Fourth Amendment bars "unreasonable" seizures. That an officer understandably could have thought his conduct to be reasonable in light of pre-existing law may be a valid reason for declining to impose damages, but it does not make the conduct "reasonable" in contemplation of current law.

Indeed, in his effort to minimize differences between the qualified immunity and Fourth Amendment standards, respondent dilutes the Fourth Amendment itself. See Gov't Br. 31 n.13. An officer enjoys qualified immunity unless pre-existing law would put a reasonable officer on notice that the conduct in question is unlawful. If taken seriously, respondent's effort to equate the Fourth Amendment and qualified immunity standards would require all open legal questions concerning reasonableness of force to be resolved against plaintiffs; whenever pre-existing law did not establish the illegality of the conduct with sufficient clarity, the conduct would remain lawful. Such a rule would freeze the current state of Fourth Amendment law in place. Common sense and the development of Fourth Amendment law—under

which the law gains clarity by the application of the reasonableness standard in novel and concrete contexts—require rejection of that approach. The test for finding a Fourth Amendment violation and the standard for imposing liability on individual officers are, and should remain, distinct. Not every Fourth Amendment violation requires the imposition of personal liability. Nor should courts be barred from providing otherwise appropriate prospective relief against unconstitutional practices merely because those practices were not clearly foreclosed by pre-existing law.

That is not to dispute that the Fourth Amendment provides room for and vindicates reasonable mistakes of *fact*. The ACLU correctly observes (Br. 10) that an officer behaves reasonably, for example, if he justifiably mistakes an innocent object for a gun. But it does not follow that the Fourth Amendment itself allows room for and vindicates mistakes of *law*—no matter how reasonable—regarding the amount of force that society is prepared to accept as reasonable and thus constitutional. To the contrary, the ultimate arbiter of the boundary between lawful and unlawful conduct must remain the *judicial* branch. That an officer reasonably erred in discerning the sometimes unclear boundary between reasonable and unreasonable force may entitle him to qualified immunity. But it does not force the judiciary to declare that conduct lawful.

B. Applying Qualified Immunity Consistent With *Anderson* Does Not Violate The Seventh Amendment

Respondent also claims (Br. 30-45) that applying qualified immunity here is somehow inconsistent with the Seventh Amendment's requirement that the right to trial by jury be "preserved." There is no reason for this Court to address that contention, as it was neither pressed nor passed upon in the court of appeals. See *Davis* v. *United States*, 495 U.S. 472, 488-489 (1990); *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

The argument is, in any event, without merit. This case arises on summary judgment under Federal Rule of Civil Procedure 56, which fully protects the Seventh Amendment values in the qualified immunity context, as it does in all others. Under Rule 56(c), a court may enter summary judgment only if there is "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Consequently, courts deciding qualified immunity issues on summary judgment must resolve all disputes regarding historical facts (what actually happened) in favor of the plaintiff; draw all factual inferences in favor of the plaintiff; and view the evidence in the light most favorable to the plaintiff. See *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986). The normal operation of those requirements prevents the case from going to the jury only if the evidence would be insufficient to support a judgment in the plaintiff's favor—in this context, only where, even under the most plaintiff-favorable set of facts supported by the evidence, a competent officer reasonably could have believed that his conduct was lawful in light of preexisting law. That does not create a Seventh Amendment problem. The Seventh Amendment does not give a plaintiff the right to take his case to trial where the admissible evidence cannot support liability, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979); nor did the common law, *id.* at 349 & n.16 (Rehnquist, J., dissenting) ("[I]n 1791 a demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice.").

Of course, qualified immunity necessarily means that some cases that otherwise would have gone to the jury will be resolved at summary judgment instead. That, however, is an inevitable consequence of a qualified immunity doctrine that provides officers an additional margin for error. Offering that additional protection under a *distinct* legal standard does not intrude on the jury's traditional fact-finding role,

and it raises no greater concerns in the excessive force context than in any other.[10]

Respondent's Seventh Amendment argument, in any event, underscores the incompatibility of the Ninth Circuit's approach with *Harlow*'s goal of resolving insubstantial claims before trial. See Gov't Br. 39-42. Under the Ninth Circuit's approach, the case must go to trial unless "the evidence *compels* the conclusion that [the] use of force was reasonable." Pet. App. 15a n.5 (emphasis added). As we have noted (Gov't Br. 39-40), this Court already has rejected a similar formulation of the qualified immunity standard in the probable-cause context because "it routinely places the question of immunity in the hands of the jury." *Hunter*, 502 U.S. at 228. The test for qualified immunity is distinct and facilitates early termination of litigation. After resolving all factual disputes and drawing all factual inferences in favor of the plaintiff, the court must grant the officer qualified immunity unless, under those facts and in light of pre-existing law, *no* appropriately competent officer reasonably could have believed the force was lawful. See *Ellis* v. *Wynalda*, 999 F.2d 243, 246 n.2 (7th Cir. 1993) (summary judgment proper where, viewing the facts most favorably to the plaintiff, "reasonable minds could differ" on the lawfulness of the conduct); *Priester*, 208 F.3d at 927 (immunity proper unless pre-

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[10] Much of respondent's Seventh Amendment analysis addresses the standard applicable *after* verdict in light of the Seventh Amendment's re-examination clause, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." That issue is not presented by this case; no trial has occurred and no fact has been "tried by a jury." However, just as normal application of summary judgment rules protects Seventh Amendment values before trial, normal application of Federal Rule of Civil Procedure 50 safeguards those values after trial. This Court has recognized that Rule 50 is consistent with the Seventh Amendment. See *Galloway* v. *United States*, 319 U.S. 372, 388-393 (1943); *Weisgram* v. *Marley Co.*, 528 U.S. 440, 449-450.

existing law "truly compel[s] (not just suggest[s] or allow[s] or raise[s] a question about), the conclusion * * * that what defendant [allegedly did] violates federal law").

C. Specialist Saucier Is Entitled To Qualified Immunity

Respondent and his amici largely abandon the Ninth Circuit's application of the Fourth Amendment and qualified immunity standards in this case. Respondent nowhere denies that competent officers—confronted by respondent's open disobedience to the law, with a large crowd behind him, and the Vice President standing a few feet ahead—could have thought it permissible to use surprise to their advantage by seizing respondent quickly and whisking him out of the crowd. Gov't Br. 44-45. Respondent does not insist that the officers should have spoken with him before seizing him, let alone that such a "speak-first" requirement was clearly established by pre-existing law. *Id.* at 45. Nor does he dispute that some modicum of force was *necessary* to remove him from the crowd in light of the fact that he attached himself to the barrier that separated him from the Vice President. See *id.* at 46-47 & n.23.[11]

Instead, respondent primarily relies on what he characterizes as a gratuitously forceful push used to place him inside a military police van. Although he suffered no injury whatsoever, respondent asserts that the push, together with the force used to remove him from the crowd, cumulatively constitute excessive force. See Resp. Br. 3 n.2. Respondent, however, nowhere explains why the two uses of force—each

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[11] Respondent asserts that the officers "dragged" him to the van. Resp. Br. 3 n.2, 9 n.7. Respondent may be asserting merely that he did not proceed to the van willingly. To the extent respondent claims he was lying down or prone, or that there was significant contact and friction between his person and the ground, the record is to the contrary. Respondent testified that the officers "held [him] up in the air," that he did not "make any effort to get [his] feet on the ground" because he "couldn't," and that his feet were at most "barely touching the ground" as he was half-walked, half-carried to the van. J.A. 25.

employed to achieve a different end—should be aggregated; or why the use of otherwise reasonable force to remove respondent from the crowd should affect the permissible force to place him in the van. This is not a case where an earlier use of force may affect the necessity of a later one; it is a case in which each use of force is justified by a separate need. Moreover, even if an earlier use of reasonable force must be treated as a "debit" against the amount of force that can be used later, that rule surely was not so clearly established that Saucier must have been "incompetent" or "knowingly violating the law" when he failed to anticipate it.

More fundamentally, the push upon which respondent places primary reliance does not establish that Specialist Saucier violated respondent's clearly established Fourth Amendment rights. For one thing, respondent ignores a long line of cases—stressed in our opening brief (Gov't Br. 43 n.20, 48-50) and by various amici (*e.g.*, FOP Br. 10-20; NAPO Br. 24-27)—holding significantly greater intrusions to be *de minimis* or otherwise too trivial to be constitutional violations where, as here, no injury resulted. See also *Graham*, 490 U.S. at 396. Nor does *Graham* establish that the minimal force used here was unconstitutional. Although respondent characterizes *Graham* as involving pushes from which "the plaintiff suffered no discernable injury," Resp. Br. 15, the plaintiff in *Graham* suffered "a broken foot, cuts on his wrists, a bruised forehead," an "injured shoulder," and a seemingly permanent "loud ringing in his right ear." 490 U.S. at 390. Respondent, in contrast, claims no physical injury. The force in *Graham* also far exceeded the force here, and included slamming the plaintiff's face into the hood of a car after he was handcuffed. *Id.* at 389. Finally, *Graham* cannot even be read as establishing that the force used there was unreasonable, because the Court did not reach that question, instead remanding to the court of appeals for application of the proper standard. *Id.* at 399.

Respondent also declares that trial in this case is necessary because there is a factual dispute on whether he resisted being placed in the van. Resp. Br. 43 & n.22. We disagree. First, even absent resistance, the shove of which respondent complains did not go so far beyond potentially lawful conduct that no competent officer could have thought it constitutional. See Gov't Br. 48-50. Second, respondent ignores his concession that he engaged in conduct—placing his feet on the bumper—that could have led a reasonable officer to believe he was resisting, even if he was not. See *id.* at 48 n.24. Finally, the undisputed fact that the push did not come from *Saucier*, but instead came from the other officer, is fatal to respondent's suit against Saucier, the lone petitioner before this Court. *Id.* at 50 & n.26.[12] Saucier did "assist" in placing respondent in the van. See Resp. Br. 4 n.4. But respondent does not identify any aspect of that assistance as constitutionally objectionable. Nor does he articulate any basis (much less a clearly established one) for holding Saucier liable for the other officer's conduct. Saucier's own conduct—placing respondent in the van from the left-hand side, rather than the other officer's allegedly offensive push from the right—did not violate respondent's clearly established Fourth Amendment rights. Accordingly, Specialist Saucier should not be forced to endure further proceedings and a time-consuming trial; he is entitled to qualified immunity now.

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For the reasons stated above, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] We pointed that fact out in our petition for a writ of certiorari (at 27-28 & n.19), and respondent did not dispute it in his brief in opposition, Gov't Br. 50 n.26. To the extent respondent seeks to dispute that fact now, his effort comes too late. See Sup. Ct. R. 15.2.

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BARBARA D. UNDERWOOD
Acting Solicitor General

MARCH 2001